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No. 03-1452

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

Supreme Court, U.S.
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G.A. MUELLER, Warden, California State Prison at Folsom,
Petitioner,
v.
JEFFREY WELTON NUNES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER G.A. MUELLER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
LAURENCE K. SULLIVAN
Supervising Deputy Attorney General
MORRIS BEATUS
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5846
Fax: (415) 703-1234
Counsel for Petitioner

TABLE OF CONTENTS

	Page
REPLY BRIEF FOR PETITIONER GA. MUELLER	1
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
Bryan v. Mullin, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc) *cert. denied*, __U.S.__,124 S.Ct. 1877 (2004)	2
Collins v. Rice, 365 F.3d 667 (9th Cir. 2004)	5
Mendiola v. Schomig, 224 F.3d 589, 593 (7th Cir. 2000) *cert. denied*, 533 U.S. 949 (2001) (deference)	2, 5
Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)	5
Strickland v. Washington, 466 U.S. 668, 698 (1984)	3
Townsend v. Sain, 372 U.S. 293, 312 (1963)	2
Valdez v. Cockrell, 274 F.3d 941, 949-51 (5th Cir. 2001) *cert. denied*, 537 U.S. 883 (2002) (deference)	2
Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2539 (2003)	2, 5
Williams v. Taylor, 529 U.S. 362, 419 (2000)	3, 5

TABLE OF AUTHORITIES (continued)

	Page
Statutes	
28 U.S.C § 2254	1, 5

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1. The State's petition poses the question whether the presumption of correctness requires deference to a state court's factual finding from evidence presented at a state court *proceeding,* even assuming the state proceeding is not a full and fair evidentiary *hearing*.

2. The language of 28 U.S.C § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, §§ 104, 110 Stat. 1218, provides that unless a state ruling on the merits is contrary to or an unreasonable application of clearly established United States Supreme Court case law, a federal habeas court cannot overturn a decision based on a reasonable "determination of the facts in light of the evidence presented in the *State court proceeding*." 28 U.S.C. § 2254(d)(2) (emphasis added). If challenged on federal habeas corpus as unreasonable, the state court's "determination of a factual issue" is presumed correct unless

rebutted "by clear and convincing evidence." § 2254(e)(1); *see also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2539 (2003) (finding shown to be incorrect by clear and convincing evidence "reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'").

A "state court proceeding" encompasses more than a full and fair evidentiary hearing. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("full and fair evidentiary hearing in a state court" can occur "either at the time of the trial or *in* a collateral proceeding") (emphasis added). The previous habeas corpus statute, which used the language of *Townsend,* expressly prevented a federal habeas court from deferring to state court determinations of fact if "the factfinding procedure employed by the State court was not adequate to afford a full and fair *hearing*," 28 U.S.C. § 2254(d)(2) (1994 ed.) (repealed 1996), "the material facts were not adequately developed at the State court *hearing*," 2254(d)(3), or "the applicant did not receive a full, fair, and adequate *hearing in the State court proceeding*," § 2254(d)(6) (emphasis added). In enacting the AEDPA, Congress removed the language limiting deference to facts developed in a state court "hearing." The words that remain are "State court proceeding."

3. Nunes essentially argues that Supreme Court Rule 10 compels this Court to avoid resolving the disputed, fundamental question of the scope of deference which federal habeas courts must accord to state court factual findings absent a full and fair hearing – notwithstanding circuit conflict on this question. *See Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc), *cert. denied,* __U.S.__,124 S.Ct. 1877 (2004) (no deference); *Valdez v. Cockrell*, 274 F.3d 941, 949-51 (5th Cir. 2001), *cert. denied,* 537 U.S. 883 (2002) (deference); *Mendiola v. Schomig*, 224 F.3d 589, 593 (7th Cir. 2000), *cert. denied,* 533 U.S. 949 (2001) (deference). In Nunes's view there is no

compelling reason to grant certiorari because the Court of Appeals alternatively overturned the state judgment as objectively unreasonable, separate from its refusal to defer to state factual findings. Respondent Br. In Opp. at 8 ("the federal appellate opinion in this case specifically avoids coming down either way"). That position lacks logic.

The undisputed fact-based nature of the state court ruling explains the panel majority's express holding that the state ruling was unreasonable because "there was *ample evidence* in the record before the state court to support" Nunes's ineffective assistance of counsel claim, making the state court's evaluation of his proof's "sufficiency" unacceptable "without affording him an evidentiary hearing[.]" App. A at 14 (emphasis added). The Ninth Circuit's decision understandably flows from fact finding. An ineffectiveness claim is a mixed question of fact and law. *Strickland v. Washington,* 466 U.S. 668, 698 (1984); *see also Williams v. Taylor*, 529 U.S. 362, 419 (2000) ("While the determination of 'prejudice' in the legal sense may be a question of law, the subsidiary inquiries are heavily factbound"). Accordingly, the federal court found the state ruling on the merits objectively unreasonable in light of the facts on which it rested. App. A at 15 ("no reasonable factfinder could believe that Nunes had been prejudiced"), 14 n.6 (unreasonable for the state court to conclude "that the evidence Nunes did produce failed to persuade").

The federal court even went out of its way to "stress" that its holding, which was contrary to that of the state court, was justified because the state court's factual findings merited no deference in the absence of an evidentiary hearing.

> Because the dissent suggests otherwise, *we stress* that we do not hold (or even hint) that the state court erred because it evaluated the facts differently than we would have or because it arrived at a different result. Instead the state

> court's decision was objectively unreasonable *because the court made factual findings* (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it rather claimed to be determining prima facie sufficiency. By contrast, *if the state court had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable.*

App. A at 16-17 (emphasis added). Under this analysis, a federal habeas court's authority to "second-guess" state evidentiary findings absent an "evidentiary hearing" is now governing law in the Ninth Circuit.

4. Nunes suggests that because the State in its petition does not address the merits of the panel majority's factual analysis, "it does not appear even to disagree with that analysis," and that it "just wants the federal courts out of the business of reviewing state convictions." Respondent's Br. In Opp. at 7. Nunes is wrong.

The question here is the scope of federal court deference under the AEDPA. As set out in the State's petition, the Ninth Circuit decision "conflicts with the language and purpose of the AEDPA," Petition for Writ of Cert. at 4, because it fails to respect the presumption of correctness accorded state court factual findings unless rebutted by clear and convincing evidence — a finding never made in this case. *Id.* at 10-11.

Resolution of this question will not put federal habeas courts out of "business." Deference to a state factual finding from a proceeding without a full and fair hearing does not deprive a habeas petitioner of an opportunity to defeat the factual premise underlying the state court's ruling. A habeas corpus petitioner

who developed or diligently sought to develop the factual basis for his claim is not barred from having an evidentiary hearing under 28 U.S.C. § 2254(e)(2) to rebut the presumption of correctness of the challenged state factual finding. *Williams v. Taylor*, 529 U.S. 420, 437 (2000). "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable *or that the factual premise was incorrect by clear and convincing evidence.*" *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (emphasis added); *see also Mendiola v. Schomig*, 224 F.3d at 593 ("If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254"). The Ninth Circuit itself applies this standard without difficulty. *See, e.g., Collins v. Rice*, 365 F.3d 667, 682, 684 (9th Cir. 2004) (clear and convincing evidence to rebut state court finding that prosecutor's reasons for excusing prospective juror not racially motivated).

5. The State is not challenging the federal court's discretion to hold an evidentiary hearing under § 2254(e)(2), given that Nunes fully developed the factual basis for his claim in state court. *See Williams v. Taylor*, 529 U.S. at 432-33. The question, assuming no full and fair *hearing* was held in the state court, is whether findings of fact from a state habeas corpus *proceeding* are presumptively correct under § 2254(e)(1). If those findings require deference, only clear and convincing evidence at a federal habeas corpus evidentiary hearing can rebut them. And if rebutted, state rulings based on those findings are objectively unreasonable under § 2254(d)(2). *See Wiggins v. Smith*, 123 S.Ct. at 2539.

Nunes cites the majority panel's statement that the State did not challenge on appeal "the district court's factual findings"

after holding an evidentiary hearing. Respondent's Br. In Opp. at 10, citing App. A at 17. The State's brief in the Ninth Circuit belies that statement. The State clearly and directly contended that "[t]he magistrate judge's finding, which the district court adopted in granting habeas relief, failed to 'give proper deference' to the state court ruling .... The magistrate judge's independent judgment is based on speculation and personal perception .... This kind of second guessing is precisely what the Supreme Court has condemned." Appellant's Opening Brief at 27-29; *see also* Petition for Rehearing and Rehearing En Banc at 6-11(deference to state court factual findings).

Nunes also argues the factual merits of his habeas claim, asserting that "*all* the factual findings by the state court of appeal were wrong and, unlike the unsupported statement made by the dissenting federal judge, *all* of the facts underlying the state court opinion were contradicted in the federal evidentiary hearing." Respondent's Br. In Opp. at 9. Absent from his comments is any reference to the burden of proof that was applied under the AEDPA in this case to rebut the state court's findings of fact. If the burden requires clear and convincing evidence, then no such standard was applied here in overturning a presumptively valid state judgment. Indeed, the panel majority expressly rejected that standard. App. A at 15 ("the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings").

6. In the present case, the state court made a factual determination in a habeas corpus proceeding. The state court found that Nunes failed to show that he would have accepted a plea offer if properly communicated. *See* App. D at 113-16. The Ninth Circuit Court of Appeals rejected the state court decision as objectively unreasonable. It rejected the state court's factual basis, ruling that it owed the finding no deference

in the absence of a state evidentiary hearing, and that "ample" or "sufficient" evidence was enough to authorize "second-guessing" of the state ruling under the AEDPA. App. A at 16-17.

7. The circuits are in clear conflict on this important question. Resolution by this Court is needed. *See* Sup. Ct. R. 10.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for writ of certiorari should be granted.

Dated: July 14, 2004

Respectfully submitted,

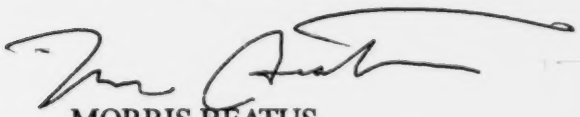
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General



MORRIS BEATUS
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

MB/cfl